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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 575

RUDOLPH R. BREGMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Opinions (R. 6a–15a) [1] of the district court, dated June 28, 1961, and August 31, 1961, denying petitioner's motions for judgment of acquittal are not reported. The opinions of the court of appeals (Pet. 15–22) affirming the conviction and denying a petition for rehearing have not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1962 (Pet. 15–20) and rehearing was de-

[1] The record in this Court consists of the Joint Appendix filed in the court of appeals, references to which will be designated "R." We have obtained a transcript of the trial proceedings (which was never submitted to the court of appeals) and have lodged it with the Clerk of this Court. References to the transcript will be designated "Tr."

nied on October 5, 1962 (Pet. 21-22). The petition for a writ of certiorari was filed on November 5, 1962. The jurisdiction of this Court is invoked under 28 U.S.C., 1254(1).

QUESTIONS PRESENTED

Petitioner was indicted for removing and concealing property of a corporation (eighteen motor trailers), upon which a levy was authorized under the internal revenue laws, with intent to defeat the collection of corporate taxes. The evidence showed that petitioner, while promising to clear up deficiencies in corporate taxes, caused false entries to be made in the corporate books in order to show that the trailers, held by the corporation under conditional sales contracts, had been repossessed by the vendor. Simultaneously, petitioner caused another of his closely-held corporations to reflect on its books the acquisition of the trailers. The questions presented are:

1. Whether the corporation had a "property" interest, or only "rights to property," in the trailers.

2. Whether the evidence established "removal" or "concealment" of the trailers within the meaning of Section 7206(4), Internal Revenue Code of 1954.

STATUTES INVOLVED

Internal Revenue Code of 1954:

> SEC. 7206. FRAUD AND FALSE STATEMENTS.
>
> Any person who—
>
> * * * * *
>
> (4) *Removal or Concealment with Intent to Defraud.*—Removes, deposits, or conceals, or is concerned in removing, depositing, or con-

cealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title:

* * * * * *

(26 U.S.C. 1958 ed., Sec. 7206.)

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property * * * belonging to such person * * *

* * * * * *

(26 U.S.C. 1958 ed., Sec. 6331.)

Pennsylvania Uniform Commercial Code, 12A Purdon's Pennsylvania Statutes Annotated, Sec. 9–311:

Alienability of Debtor's Rights.

A debtor's rights in collateral—

(a) are alienable, although the security agreement may make disposition without the secured party's consent a default; and

(b) may be reached by attachment, levy, garnishment or other appropriate judicial process. (1953, April 6, P.L. 3, Sec. 9–311.)

STATEMENT

Defendant and his attorney, Milton H. L. Schwartz, were indicted on March 1, 1960, under Section 7206

(4), Internal Revenue Code of 1954, in that "with intent to evade and defeat collection of taxes assessed against Rudolph Motor Service, Inc. [they] did knowingly and unlawfully remove and conceal eighteen (18) Strick Trailers, property of Rudolph Motors Service, Inc., upon which a levy was authorized by Section 6331 of the Internal Revenue Code of 1954". (R. 5a.) A jury sitting in the Eastern District of Pennsylvania convicted petitioner Bregman on June 13, 1961, but was unable to reach a verdict as to his co-defendant. Bregman was sentenced on September 13, 1961, to four years in prison, of which three and a half years were suspended. (Pet. 6.) The court of appeals affirmed.[2]

As stated by the court below (Pet. 16–17), the evidence showed that Rudolph Motors Service, Inc. was a closely-held corporation of which petitioner was president; that, in 1953, the company owed various federal taxes; that petitioner induced the Internal Revenue Service not to levy on the corporate property, promising that the taxes would be made good; that, during the period of its delinquency, the corporation held eighteen trailers under a conditional sales contract; and that, while the government forebore from levying at petitioner's urging, false entries were made on the corporate records indicating that the trailers had been "repossessed" by the conditional vendor as of October 30, 1954.

[2] On petition for rehearing, which was considered by the entire court, Chief Judge Biggs (who was not a member of the original panel) dissented.

The evidence also showed that petitioner pleaded with the Internal Revenue Service not to exercise its right to levy on corporate property and promised that the corporation would pay up the deficiencies (Tr. 86–95, 145–146); that he falsely informed revenue agents that the trailers had been repossessed by the vendor on October 30, 1954 (Tr. 732–736); that the deficiencies were not paid up (Tr. 655); that on November 1, 1954, petitioner caused the books of Rising Sun Truck Rental Company (which he controlled) to reflect acquisition of the conditional sales contracts on the trailers (Tr. 692–695); that he ultimately obtained title to the trailers himself (Tr. 707); and that he thereby defeated the right of the Internal Revenue Service to seize them by levy upon the assets of the corporation (Tr. 211–212).

ARGUMENT

1. Petitioner asserts that the corporation's interest in the subject trailers was merely a "right to property" and (Pet. 7–8) that, while Section 6331 (*supra*, p. 3) permits levies upon both "property" *and* "rights to property", Section 7206(4) makes criminal only the removal or concealment of "property".

But the interest of the corporation in the trailers was a "property" interest, not merely a "right to property". The corporation plainly had the right of possession, use, enjoyment, and (under controlling Pennsylvania law[3]) disposition of the subject trailers. No other label but that of "property" can be attached

[3] 12A Purdon's Pennsylvania Statutes Annotated, Sec. 9–311, *supra*, p. 3.

to such an interest. See *Willcox* v. *Penn Mutual Life Insurance Co.*, 357 Pa. 581, 595–596. A "right to property", as distinguishable from "property", is an intangible interest, not coupled with physical use or enjoyment, i.e., a chose in action. As Judge Learned Hand observed in *United States* v. *Metropolitan Life Ins. Co.*, 130 F. 2d 149, 151 (C.A. 2d):

> It seems very probable that the words "rights to property," introduced in 1866 at the same time that choses in action were first made leviable, were meant to cover them as distinguished from chattels described as "property"; at least it is hard to understand what else could have been intended. * * *

See, also, *Bensinger* v. *Davidson*, 147 F. Supp. 240, 245 (S.D. Cal.), in which the intangible right of a conditional vendee out of possession (that is, his claim against the conditional vendor for unjust enrichment) was said to be reachable by Government lien. Whatever may be the application of Section 7206(4) to choses in action, it is clear that the corporation's interest in the trailers was within the reach of the statute.

2. Petitioner argues (Pet. 9–12) that Section 7206 (4) requires a physical "removal or concealment", and that he could not be convicted under that statute because all that the prosecution proved was a false entry on the corporate books. But neither as a matter of language nor from the standpoint of the policy involved—protection of the revenue against fraud—is there any reason to imply a license to engage in particular types of concealment. None of

the cases cited by petitioner (Pet. 8) supports the proposition that there must be a *physical* concealment as opposed to that accomplished by a false book entry. In one of them, in fact, a conviction was upheld in circumstances where the jury was free, under the instructions of the trial court, to find the defendant guilty because he had submitted a false inventory of his liquor stock to a revenue agent. *Auerbach* v. *United States,* 136 F. 2d 882, 885 (C.A. 6th).[4] The court below properly relied here (Pet. 19) upon its previous definition of "concealment" in *United States* v. *Schireson,* 116 F. 2d 881, 884, an analogous case involving the concealment of assets in a bankruptcy proceeding by falsification of a schedule presented to the trustee.[5]

Furthermore, as we have shown in the Statement (*supra,* p 5), there was much more to the evidence of removal and concealment than (as petitioner would have it) a mere false book entry. The evidence established to the trial court's satisfaction (R. 6a, 9a), that petitioner, while pleading with the Internal Rev-

[4] In the *Auerbach* case, the court of appeals refused to consider an argument that the charge was erroneous, since there had been no objection to it at the trial. If the court had felt that there was merit in the argument, similar to that here presented by petitioner, presumably it would have reversed on the ground that the jury had been allowed to convict on an entirely erroneous theory.

[5] There is plainly no merit in petitioner's reliance upon *De Jonge* v. *Oregon,* 299 U.S. 353, and *Stirone* v. *United States,* 361 U.S. 212, for the contention that he was convicted of a charge not made in the indictment. The indictment charged, in the language of the statute, that he had concealed trailers which were the property of the corporation, and that is what the proof showed.

enue Service not to file liens against corporate property and while promising to make good the corporation's tax deficiencies, not only made false entries indicating repossession of the trailers by the vendor, but was also engaged in transferring the corporation's property in the trailers to another corporation, and ultimately to himself. By these acts, petitioner effectively destroyed the right of the Internal Revenue Service to levy upon the trailers, since the corporate taxes involved were Employment and Transportation taxes (Tr. 211–212) which the Revenue Service lacks authority to follow by a "transferee assessment" as it may do in the case of Income, Estate and Gift taxes.[6]

CONCLUSION

For the reasons stated, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1963.

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[6] Section 6901(a), Internal Revenue Code of 1954 (26 U.S.C. 1958 ed., Sec. 6901(a)).